

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DONNA CORBELLO,)
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Plaintiff,)
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vs.)
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THOMAS GAETANO DEVITO et al.,)
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Defendants.)
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ORDER

Plaintiff Donna Corbello is the widow and heir of Rex Woodard, who assisted Defendant Thomas Gaetano “Tommy” DeVito in writing his unpublished autobiography (the “Work”). Plaintiff alleges that DeVito and others wrongfully appropriated the Work to develop the screenplay for *Jersey Boys*, a hit musical based on the band The Four Seasons that has played in the United States, Canada, England, and Australia. Corbello has sued several companies and individuals for copyright infringement, and she has sued DeVito for an accounting and under several state law causes of action. Pending before the Court are twelve motions in limine and three stipulations. The Court addressed the motions and stipulations initially at an October 6, 2016 hearing and has now read the responses thereto. Except as otherwise stated herein, the Court’s reasons for its rulings herein are those stated on the record at the hearing.

1 **I. LEGAL STANDARDS**

2 A motion in limine is a procedural device to obtain an early and preliminary ruling on the
3 admissibility of evidence. Black's Law Dictionary defines it as “[a] pretrial request that certain
4 inadmissible evidence not be referred to or offered at trial. Typically, a party makes this motion
5 when it believes that mere mention of the evidence during trial would be highly prejudicial and
6 could not be remedied by an instruction to disregard.” Black's Law Dictionary 1171 (10th ed.
7 2014). Although the Federal Rules of Evidence do not explicitly authorize a motion in limine,
8 the Supreme Court has held that trial judges are authorized to rule on motions in limine pursuant
9 to their authority to manage trials. *See Luce v. United States*, 469 U.S. 38, 41 n.4 (1984) (citing
10 Fed. R. Evid. 103(c) (providing that trial should be conducted so as to “prevent inadmissible
11 evidence from being suggested to the jury by any means”)).

12 Judges have broad discretion when ruling on motions in limine. *See Jenkins v. Chrysler
13 Motors Corp.*, 316 F.3d 663, 664 (7th Cir. 2002). However, a motion in limine should not be
14 used to resolve factual disputes or weigh evidence. *See C&E Servs., Inc., v. Ashland, Inc.*, 539 F.
15 Supp. 2d 316, 323 (D.D.C. 2008). To exclude evidence on a motion in limine “the evidence
16 must be inadmissible on all potential grounds.” *E.g., Ind. Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp.
17 2d 844, 846 (N.D. Ohio 2004). “Unless evidence meets this high standard, evidentiary rulings
18 should be deferred until trial so that questions of foundation, relevancy and potential prejudice
19 may be resolved in proper context.” *Hawthorne Partners v. AT&T Tech., Inc.*, 831 F. Supp.
20 1398, 1400 (N.D. Ill. 1993). This is because although rulings on motions in limine may save
21 “time, costs, effort and preparation, a court is almost always better situated during the actual trial

1 to assess the value and utility of evidence.” *Wilkins v. Kmart Corp.*, 487 F. Supp. 2d 1216, 1219
2 (D. Kan. 2007).

3 In limine rulings are preliminary and therefore “are not binding on the trial judge [who]
4 may always change his mind during the course of a trial.” *Ohler v. United States*, 529 U.S. 753,
5 758 n.3 (2000); *accord Luce*, 469 U.S. at 41 (noting that in limine rulings are always subject to
6 change, especially if the evidence unfolds in an unanticipated manner). “Denial of a motion in
7 limine does not necessarily mean that all evidence contemplated by the motion will be admitted
8 to trial. Denial merely means that without the context of trial, the court is unable to determine
9 whether the evidence in question should be excluded.” *Ind. Ins. Co.*, 326 F. Supp. 2d at 846.

10 **II. ANALYSIS**

11 **A. Plaintiff’s Motions in Limine**

12 **1. Motion No. 987**

13 Plaintiff asks the Court to exclude the deposition testimony of Cindy Ceen, Myrtle
14 Locke, Allen Peacock, and Elliot Brown (except potentially for the purpose of impeachment)
15 because these witnesses are not unavailable. The Court denies the motion, because the witnesses
16 are in fact “unavailable” under the definition given by Rule 32. *See Fed. R. Civ. P. 32(a)(4)(B)*
17 (providing that a party may use the deposition of a party or non-party for any purpose if the
18 deponent is more than 100 miles from the place of trial unless the deponent’s absence was
19 procured by the party offering the deposition). It appears undisputed that the deponents
20 identified reside more than 100 miles from Reno. The Court will, however, not permit the
21 deposition testimony if Plaintiff can show at trial that Defendants procured their absence.

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1 **2. Motion No. 995**

2 Plaintiff asks the Court to admit a “marked-up” copy of the Work, certain emails by
3 Defendants regarding the Work, and two news articles quoting Defendant McAnuff. The Court
4 grants the motion in part. The ruling is preliminary and subject to appropriate objection at trial,
5 but the Court rejects Defendants arguments that the “marked-up” copy of the Work is irrelevant
6 or unfairly prejudicial. The emails concerning access to the Work and Woodard’s authorship are
7 also relevant to direct copying and willful infringement at a minimum. Finally, newspaper and
8 magazine quotations of McAnuff are admissible against McAnuff if the respective authors are
9 available for cross-examination by McAnuff, but the articles otherwise constitute inadmissible
10 hearsay.

11 **B. Defendants’ Motions in Limine**

12 **1. Motion No. 996**

13 Defendants ask the Court to exclude the testimony of Plaintiff’s expert Richard Krevolin.
14 The Court grants the motion in part. Mr. Krevolin may not testify as to his legal conclusions as
15 to substantial similarity or infringement or the law of copyright generally. Not only are legal
16 conclusions the province of the jury and legal instructions the province of the Court, but Mr.
17 Krevolin does not appear to be an expert on copyright law in any case. Subject to expert
18 qualification at trial, however, he may testify as to point-by-point comparisons of the Work to
19 scripts, notes, etc.

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1 **2. Motion No. 1002**

2 Defendants ask the Court to exclude evidence of the terms of DeVito's settlement with
3 Plaintiff. The Court denies the motion as moot in light of the stipulation on this topic.

4 **3. Motion No. 990**

5 Defendants ask the Court to exclude evidence of Rex Woodard's health and the
6 circumstances of his death. The Court grants the motion.

7 **4. Motion No. 991**

8 Defendants ask the Court to exclude evidence of Rex Woodard's will, obituary, or desires
9 regarding the Work. The Court grants the motion in part but denies it as to evidence of how
10 Plaintiff obtained rights to the Work, i.e., via inheritance.

11 **5. Motion No. 997**

12 Defendants ask the Court to exclude evidence of similarities between the Work and
13 *Jersey Boys* not previously identified by Plaintiff and which did not pass the extrinsic test at
14 summary judgment. The Court denies the motion. Plaintiff cannot avoid rulings on summary
15 judgment as to thin versus thick protection by adducing evidence at trial that she did not adduce
16 when necessary to avoid summary adjudication of certain issues, but that does not mean that any
17 evidence that would have aided Plaintiff at summary judgment is inadmissible at trial for any
18 purpose. Plaintiff may be able to identify similarities at trial that she did not identify at summary
19 judgment and thereby prevail under thin protection. Alternatively, Plaintiff can prevail by
20 showing evidence of direct copying, regardless of whether the elements copied were identified at

1 summary judgment. The Court denied summary judgment to Defendants on a direct copying
2 theory.

3 **6. Motion No. 992**

4 Defendants ask the Court to exclude evidence that the Work is fictionalized or that it
5 contains incorrect facts or mistakes. The Court denies the motion. Plaintiffs may argue to the
6 jury that certain portions of the Work are fictionalized accounts. The Court found no evidence of
7 this at summary judgment in the face of the evidence that the Work was intended to be a
8 historical account. For that reason, and others, the Court ultimately determined that the Work
9 was entitled to “thin” copyright protection under the access-plus-substantial-similarity test (in the
10 alternative to a finding of direct copying). In summary, Plaintiff is correct that she is not
11 precluded from attempting to show that certain similarities between the Work and *Jersey Boys*
12 concern fictionalizations created by the authors of the Work, but Defendants are correct that no
13 matter how much of the Work Plaintiff manages to convince the jury is fiction as opposed to
14 fact, the Court’s summary judgment ruling permits the jury to apply only “thin” protection. The
15 Court denies the motion as to the evidence or argumentation sought to be excluded but notes that
16 it will instruct the jury only as to “thin” protection no matter how much evidence of purported
17 fictionalization Plaintiff puts forth at trial.

18 **7. Motion No. 993**

19 Defendants ask the Court to exclude evidence of drafts of the *Jersey Boys* script or other
20 pre-script material such as outlines, notes, or annotations. The Court denies the motion.

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1 **8. Motion No. 994**

2 Defendants ask the Court to exclude evidence of Defendants' state of mind, intent, or
3 willfulness. The Court denies the motion.

4 **9. Motion No. 998**

5 Defendants ask the Court to exclude evidence concerning Plaintiff's "selection and
6 arrangement" theory of infringement. The Court denies the motion.

7 **10. Motion No. 999**

8 Defendants ask the Court to exclude deposition testimony of Charles Alexander
9 concerning Brickman's state of mind as hearsay and irrelevant, or to permit certain rebuttal
10 evidence. The Court denies the motion.

11 **C. Stipulations**

12 The parties have asked the Court to approve stipulations to exclude from the first phase
13 of trial: (1) evidence that DeVito "covered up" his use of the Work (but not evidence of the cover
14 page of the Work that DeVito gave to Brickman); (2) evidence of the amount of revenue,
15 earnings, or profits made via *Jersey Boys* (but not evidence that the play has generally been
16 successful, etc.); (3) evidence of amounts of earnings or payments to employees and contractors
17 relating to *Jersey Boys* (but not evidence of payments to DeVito relating to *Jersey Boys* or
18 whether DeVito or Defendants shared any *Jersey Boys*-related income with Plaintiff); and (4)
19 evidence of DeVito's settlement with Plaintiff. The parties have also stipulated to the following
20 jury instruction:

21 In addition to the defendants I have previously mentioned, the plaintiff also
22 brought suit against her copyright co-owner, Thomas DeVito. The plaintiff

1 resolved her disputes with Mr. DeVito before this trial commenced. A plaintiff can
2 properly settle her disputes with one defendant while electing to pursue her claims
3 against other defendants. You should not concern yourself with, or speculate as to,
4 the reasons why Mr. DeVito is no longer a defendant in this case, nor should you
5 consider the plaintiff's settlement with Mr. DeVito in any manner when reaching a
6 verdict.

7 The Court approves the stipulations.

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CONCLUSION

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10 IT IS HEREBY ORDERED that the Motions in Limine (ECF No. 990) and the
11 Stipulations (ECF Nos. 989, 1000, 1001) are GRANTED.

12 IT IS FURTHER ORDERED that the Motions in Limine (ECF Nos. 991, 995, 996) are
13 GRANTED IN PART and DENIED IN PART, as explained herein.

14 IT IS FURTHER ORDERED that the Motions in Limine (ECF Nos. 987, 992, 993, 994,
15 997, 998, 999) are DENIED.

16 IT IS FURTHER ORDERED that the Motion in Limine (ECF No. 1002) is DENIED as
17 moot.

18 IT IS SO ORDERED.

19 Dated this 18th day of October, 2016.

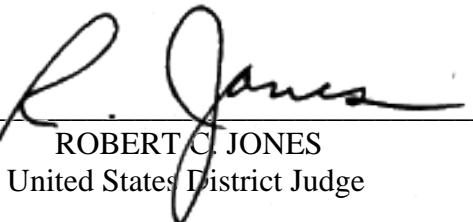
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ROBERT C. JONES
United States District Judge